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October Term, 1995

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Petitioners,

vs.

THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND AMICUS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS AND AMICUS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. Sovereign Immunity Is Not A Bar To Constitutional Review Of Section 601.

Respondents in opposition to the petition first attack the lower courts' decision to review the merits of Petitioners' action for declaratory and injunctive relief. (Brief for the Respondents in Opposition, hereinafter "Resp. ___," at 7-9). Respondents again argue that Section 601 is shielded from constitutional scrutiny by the doctrine of sovereign immunity. (Resp. 7-9). This argument has no merit. It was properly rejected by both the court of appeals and the district court. (Appendix to Petition for Writ of Certiorari, hereinafter "Pet. ___," or "Pet. App. ___," at 7-9 and 21-24).

As Petitioners explained below, the sovereign immunity doctrine does not apply to suits seeking declaratory or injunctive relief.[1] Moreover, there is no sovereign immunity against a suit which seeks relief from action or threatened action of an unconstitutional nature by an official of the federal government, i.e., the Attorney General, or a federal agency. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), *reh'g denied*, 338 U.S. 840 (1949).

Federal courts have routinely applied the rule stated in *Larson* to permit parties to maintain suits which seek to enjoin action or threatened action by a federal officer under an unconstitutional statute. *See, e.g., Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); *Carter v. Seamans*, 411 F.2d 767, 770-71 (5th Cir. 1969), *cert.*

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[1] *See also* 1 Jeremy C. Moore, et al., *Moore's Federal Practice* ¶ 300.03[6], ("Because suits seeking declaratory or injunctive relief do not involve recoveries from the federal treasury, injunctive or declaratory relief may be had against the federal officials for their alleged unconstitutional or otherwise unlawful conduct, without impinging on the sovereign immunity of the United States."). *Cf. Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); and *Garcia v. United States*, 538 F. Supp. 814, 816 (S.D. Tex. 1982).

denied, 397 U.S. 941 (1970); *Seltzer v. Foley*, 502 F. Supp. 600, 601 (S.D. N.Y. 1980); *Neal v. Secretary of Navy*, 472 F. Supp. 763, 770-71 (E.D. Pa. 1979), *rev'd on other grounds*, 639 F.2d 1029 (3d Cir. 1981); *Weeks v. United States*, 406 F. Supp. 1309, 1325 (W.D. Okla. 1975), *rev'd on other grounds*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

Respondents again argue, as they did below, that Section 601 provides for no implementation nor enforcement action by the Attorney General. (Resp. 8-9). However, Respondents acknowledged in a still-pending parallel challenge to Section 601 in *Barbier Truck Service, Inc., et al. v. United States, et al.*, Case No. 94-CV-989-WDS that:

> Upon further consideration and analysis, defendants [the United States of American, ex rel. the Department of Justice and Janet Reno, Attorney General of the United States] have concluded that through other statutory authority they possess residual authority to enforce Section 601.[2]

(Defendants' Supplemental Statement with Respect to Jurisdiction, p. 1, App. AA at 2).[3] Accordingly, far from being powerless, the Department of Justice there conceded that it is a federal agency with very real powers to enforce Section 601. Where a facial constitutional challenge of a declaratory judgment nature is brought against the United States, and its officers and agencies, sovereign immunity does not obtain.

Respondents also attempt to resurrect their standing argument[4] directly contradicting their Supplemental Statement in *Barbier*, *supra*, where they conceded:

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[2] Although the district court in *Barbier* denied Plaintiff's Motion for Preliminary Injunction on August 8, 1995, it has not yet proceeded to trial. The court in *Barbier* also rejected Defendants' sovereign immunity and standing arguments.

[3] Defendants in *Barbier* acknowledged that such residual authority resides in 49 U.S.C. §§ 46106, 46107 and 11703 (now § 14703). (*Id.*, at 2, App. AA at 2).

[4] Respondents argued standing before the district court, but not at the court of appeals level.

> Defendants recede from their position plaintiffs lack standing because of an injury fairly traceable to defendants' conduct.

(App. at 2). The district court in this proceeding carefully analyzed and rejected Respondents' standing assertions. (Pet. App. 24-32).

There is standing in this proceeding on behalf of all Petitioners fully consistent with *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Petitioners' injuries are fairly traceable to Respondents' conduct. Neither are the injuries asserted hypothetical. The meaning of Section 601 has been made evident by this Court's decisions in *American Airlines v. Wolens*, 513 U.S. ___, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) and *Morales v. Trans-World Airlines*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). (Pet. 23-24), thereby confirming that the scope of intrastate preemption will be dramatically restrictive. An injunction against Respondents and a declaratory judgment invalidating Section 601 will confer relief on Petitioners.

B. The Preemptive Disguise Of Section 601 Does Not Save It From Being Violative of the Tenth Amendment.

As Congress did not compel the states to enact and enforce a federal regulatory program, but, instead, merely prohibited all motor carrier (and air carrier affiliate) intrastate regulation related to price, route, or service, Respondents and Amicus United Parcel Service, Inc. (UPS) contend that Section 601 is immune from Tenth Amendment attack. (Resp. 10-11; Brief *Amicus* Curiae of United Parcel Service, Inc., in support of Respondents, hereinafter "UPS ___," at 12-17). They maintain that Section 601 is only a preemption, which Congress is authorized to do and, accordingly, is distinguishable from the defective statute examined by this Court in *New York v. United States*, 402 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Respondents and UPS are in error. The reasoning of the *New York* Court is directly applicable to this

Section 601 prohibition, which is tantamount to a compulsion. The lower court decision stands contrary to *New York*.

In the first instance, Section 601 is not a true preemption. It does not fill a field with federal regulation. It does not impose a unified federal-state regulatory scheme. It does not determine that there shall be no federal or state motor carrier regulation. Rather than create consistency of regulation, it perpetuates "a patchwork," through a federal system of rules and controls for interstate carriers and a regulatory vacuum for intrastate carriers (and a vacuum as well for the intrastate side of the operations of carriers that engage in interstate transportation).

UPS is wrong when it proclaims that the ICC Termination Act of 1995 (hereinafter "ICCTA") "effectively evaporates" any disparities between federal regulation and the state regulatory void.[5] Notwithstanding the contentions of UPS (UPS 14 n.4), Congress reaffirmed its judgment that federal regulation was required in certain areas of *interstate* motor transportation, through the passage of ICCTA, that transferred most remaining transportation functions to a newly created Surface Transportation Board and the U.S. Department of Transportation. At the same time, Congress continued the irrational two-tiered level of regulation, by recodifying the Section 601 preemption (the motor carrier portion) at 49 U.S.C. § 14501.[6]

The two-tiered framework of regulation (i.e., regulation for interstate shipments and non-regulation for intrastate shipments) is not part of a unified national system of regulation, where market forces in certain areas are allowed to play out on both a state and national level as was the case in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976). (*See* Pet. 14 n.14). The contentions of Respondent and UPS on this point are meritless.

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[5] See Pet. 12 n.12, for a listing of some of the motor carrier regulatory strictures of ICCTA applicable to *interstate* motor carriers.

[6] *See* Pet. 2 & n.3, 3 & n.4-5.

The bi-level regulatory playing field left by Section 601 does have important consequences for the Tenth Amendment analysis, also. For example, Congress has left in place the full liability standard for loss and damage of interstate shipments, absent written agreement of the carrier and shipper, at 49 U.S.C. § 14706. Likewise, a "truth-in-billing" requirement exists on interstate shipments, pursuant to 49 U.S.C. § 13708. No such requirements exist for shipments in intrastate commerce, however. No federal agency regulates such intrastate activities. THE STATES ARE PROHIBITED BY SECTION 601 FROM REGULATING SUCH SHIPMENTS, EVEN IN A FASHION IDENTICAL TO FEDERAL REGULATION.

The citizenry will hold the states accountable for failing to regulate, not the federal government. While the federal government has protected shippers and receivers from unscrupulous, irresponsible or careless motor carriers with regard to billing and cargo loss, it has precluded states from taking the same action. It will be the local units of government which will be blamed for the lack of corresponding consumer protection *at the local level*. This is why the distinction of this unique form of preemption does have constitutional significance, contrary to Respondents' protestations. (Resp. 11).

Justice O'Connor's dissenting opinion, in *FERC*, *supra*, 72 L. Ed. 2d at 564, is instructive on this issue:

> When Congress preempts a field, *it precludes only state legislation that conflicts with the national approach*. (emphasis supplied).

Congress only occupies a field in such a way that there can be no state regulation "in rare instances." *Id.* at 564 n.18. As to the offensiveness of compulsion, Justice O'Connor wrote:

> Local citizens hold their utility commissioners accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs. *Id.*

These are the same concerns as were expressed by the Court in *New York*, *supra*, 112 S. Ct. at 2424. In like fashion, the Section 601 prohibition, coupled with the two tiers of regulation, has the same practical effects as a compulsion, in undermining the Constitutional principle of federalism.

Because of the enactment of Section 601, the states can no longer serve as legislative laboratories. Michigan cannot fine tune its motor carrier legislation to meet its electorate's changing needs as it had in 1982 and 1993 (after extensive hearings held around the state and detailed legislative scrutiny); Montana cannot require that intrastate common carriers provide adequate service on reasonable request, as is still required at the federal level (*see* 49 U.S.C. § 14101(c)); Kansas cannot apply its state statutory standard for cargo loss and liability; and Oklahoma cannot supervise the oilfield operations of its saltwater carriers. Similarly, the other 36 states (all save Hawaii, exempted from the preemption) which economically regulated their intrastate motor carrier industries are bereft of their ability to remain responsible to their electorate. Further, the remaining states which never regulated truck transportation economically (two states), or determined, *through their own legislative processes*, to end economic regulation (seven states), stand to see existing laws preempted on matters as diverse as consumer protection, antitrust, bills of lading, Article VII of the Uniform Commercial Code, and carrier liability for shipment loss and damage.

This prohibition has the same effect as a compulsion. If citizens do not retain the power to govern their local problems, the lessons of self-government will be lost. *Id.* at 566-567. As in *New York*, *supra*, 112 S. Ct. at 2424, "the accountability of both state and federal officials is diminished" through the Section 601 command not to govern. The negative "freedom" that is the Section 601 prohibition impinges on state sovereignty in exactly the same manner as does a compulsion. It should not be allowed to stand.

C. Section 601 Is Not A Constitutionally Permissible Exercise Of Authority Under The Commerce Clause.

Respondents and UPS argue that Section 601 is a constitutionally unremarkable exercise of congressional Commerce Clause authority, consistent with this Court's precedents. If this Court's precedents are taken to mean that congressional authority under the Commerce Clause is limitless, then Section 601 is unremarkable.

However, the Supreme Court precedents, as this Court recently restated in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1626-1627, 131 L.Ed.2d 626 (1995), establish that the Commerce Clause has defined boundaries.[7] Section 601

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[7] "In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); "The power of Congress in this field is broad and sweeping; *where it keeps within its sphere and violates no express constitutional limitation* it has been the rule of this Court . . . not to interfere." *Katzenbach v. McClung*, 379 U.S. 305, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964) (emphasis supplied); "This Court has always recognized that the power to regulate commerce, while broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress *if it exerts a substantial effect on interstate commerce. . . .* " *Perez v. United States*, 402 U.S. 146, 151-152, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) (emphasis supplied), quoting *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 87 L. Ed. 122 (1942); "This power acknowledges no limitations, *other than are prescribed in the Constitution.*" *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1, 16 (1981) (emphasis supplied), quoting *Gibbons v. Ogden*, 9 Wheat 1, 196, 6 L. Ed. 23 (1824); "Thus, it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited." *Hodel, supra,* 38 (Rehnquist, J. concurring); "The propriety of this type of legislation – *so long as it is a valid exercise of the commerce power. . . .*," *FERC v. Mississippi*, 462 U.S. 742, 102 S. Ct. 2126, 72 L. Ed. 2d 532, 547 (1982) (emphasis supplied); "Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016, 1037 (1985); and "The *Gibbons* Court . . . acknowledged that limitations on the commerce power

does not stand scrutiny under the *Hodel* test. *Hodel* cannot be misapplied to such an extent that it becomes meaningless.

Contrary to the contentions of Respondents and UPS, this Court is not required to follow lockstep an unfounded congressional conclusion that preempted activities have a substantial effect on interstate commerce. *Wirtz*, *supra*, 392 U.S. at 198, and *Hodel*, *supra*, 452 U.S. at 311 (Rehnquist, J., concurring). Congress candidly acknowledged that the genesis of Section 601 grew out of disparate regulatory treatment by some states of large package delivery carriers (including Federal Express Corporation, UPS, and Roadway Package Express) in the wake of a holding by the United States Court of Appeals for the Ninth Circuit in *Federal Express Corporation v. California Public Utilities Commission*, 936 F. 2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess., at 87, *reprinted in*, 1994 U.S.C.C.A.N. at 1759.[8] There was no Congressional consideration of whether the local transportation of disabled vehicles or saltwater brine or recyclable materials or gravel or the local relocation of used office furnishings have a substantial effect on interstate commerce. The congressional action in enacting Section 601 did not consider these activities, because they were outside of the congressional focus on package carriers at the time, but not outside the scope, unfortunately, of the overbroad legislative solution.

Further, such truck activities have importance to local economies, and have been deemed worthy of regulation by local and state governments in a variety of respects, all ended

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are inherent in the very language of the Commerce Clause. . . . 'Comprehensive as the word [among] is, it may very properly be restricted to that commerce which concerns more States than one.' " *Lopez*, *supra* 115 S. Ct. 1624, 1626, quoting *Gibbons*, *supra*, 9 Wheat 1, 194-195.

[8] The court of appeals in *Federal Express* did not, as UPS suggests, find constitutional the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-405, 92 Stat. 1707. Neither does the ADA, as UPS contends, preempt air regulation in the same fashion as Section 601. Rather, the ADA assigned the responsibility of regulating intrastate air transportation to the Federal Aviation Administration (and its predecessor Civil Aeronautics Board). (*See also* Pet. 22 n.21).

by Section 601. It is not proper to term these activities "*de minimis*," as Respondents and UPS do. (Resp. 10; UPS 7). For example, the application of state or local consumer protection laws to unscrupulous tow-truck operators (now limited to "non-consensual" tows) is not unimportant to either the affected consumer or governmental unit.

Section 601 does not satisfy the second part of the *Hodel* test either, in that a reasonable relationship does not exist between the selected means and the permitted end of the preemption provision. The meaning of Section 601 is clear, after this Court's decisions in *Wolens*, and *Morales*, *supra*. All "related" state-imposed regulations fall. It is not limited to state economic regulatory statutes. That the states were left with the trappings of certain minimum safety regulatory responsibilities does not change the fact that the means selected in this vast-encompassing preemptive sweep were unreasonable.

Respondents and UPS not surprisingly take solace in *Lopez*, as it was also relied upon heavily by the court of appeals below in finding Section 601 to be within the scope of Commerce Clause power. (Resp. 9-10; UPS 3, 6-8). However, this Court in *Lopez did not* state that all commercial activities necessarily fall within the scope of Congress' Commerce Clause power. The Court did evince a concern for Congress to distinguish "between what is truly national and what is truly local." *Id.* at 1634. The Court referred to "move[ment] in interstate commerce" and a "concrete tie to interstate commerce" as non-existent factors in *Lopez*. *Id.*

Section 601 was not limited to shipments moving in interstate commerce, carriers engaging in interstate commerce, or carriers with concrete ties to interstate commerce. It does not distinguish between what is truly national and truly local. Therein lies another constitutional flaw.

D. In Encroaching On State Sovereignty, Section 601 Also Offends the Guarantee Clause.

Respondents contend that the court below correctly rejected Petitioners' Guarantee Clause claim, as Section 601

does not alter the form or structure of the states' form of government. (Resp. 11-12). However, *New York*, *supra*, 112 S. Ct. at 2433, in its Guarantee Clause analysis, was not so narrow. The *New York* Court referred to the continued ability of the states in that case to set their own legislative agendas, and to remain accountable to their electorates. The Section 601 prohibition, in failing to impose upon the states the federal interstate system of regulation, and creating an intrastate regulatory void, has just the opposite effect. The states cannot set their own legislative agendas vis-a-vis their own local problems. They cannot remain responsible to their electorates. See the discussion at 5, 6, 9, *supra*. The Guarantee Clause is also violated.

CONCLUSION

In order to address the conflict between the court of appeals' decision and both *Hodel* and *New York*, and to resolve the vital federal questions raised by the lower courts' determination of Section 601's constitutionality, the petition for a writ of certiorari should be granted.

Respectfully submitted,[9]

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[9] See Appendix BB for the names of the additional parties and their counsel jointly submitting this Reply Brief.

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BARBIER TRUCK SERVICE, INC., PAUL JOHNSON, INC., J-M TRANSPORTS, INC., L & E CARTAGE COMPANY, LOTS TRUCKING, INC., MAYFIELD TRANSFER CO., GARY L. McKAY AND GLENN L. McKAY, d/b/a McKAY TRUCKING, PEET FRATE LINE, INC., FRATE SERVICE, INC., CBA TRUCKING COMPANY, RUDOLF EXPRESS CO., R.L. NEHLS TRANSFER, INC. AND MACK AND RIGGLE, INC., Plaintiffs, vs. THE UNITED STATES OF AMERICA, ex rel. the Department of Justice; and JANET RENO, Attorney General of the United States, Defendants.	Case No. 94-CV-989-WDS

DEFENDANTS' SUPPLEMENTAL STATEMENT WITH RESPECT TO JURISDICTION

In Defendants' Memorandum in Support of their Motion to Dismiss, defendants challenged plaintiffs'

standing with respect to both their failure to allege a concrete and imminent injury and their failure to allege an injury fairly traceable to defendants' conduct. Defendants have continued to evaluate their authority to enforce Section 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601. Upon further consideration and analysis, defendants have concluded that through other statutory authority they possess residual authority to enforce Section 601.

Section 601 consists of four subsections: subsection (a) is a statement of findings; subsection (b) addresses transportation of air carriers or carriers affiliated with direct air carriers and amends 49 U.S.C. § 41713(b); subsection (c) addresses transportation by motor carriers and amends 49 U.S.C. § 11501; and subsection (d) establishes the effective date of the section. None of these provisions by itself authorizes enforcement of section 601. However, because subsections 601(b) and (c) amend existing statutory provisions in Title 49, they come within general enforcement authority found in the subtitles of Title 49 where the respective subsections are codified.

Sections 46106 and 46107 of Title 49 authorize the Secretary of Transportation and the Attorney General, respectively, to bring civil action to enforce Title 49, Part A of subtitle VII – Aviation Programs, which part includes 49 U.S.C. § 41713, the section amended by subsection 601(b) relating to air carriers. Similarly, 49 U.S.C. § 11703 authorizes the Attorney General to "bring court proceedings to enforce [Subtitle IV – Interstate Commerce]" which subtitle includes 49 U.S.C. § 11501, the statutory provision amended by subsection 601(c) and covering deregulation of motor carriers.

Therefore, defendants recede from their position that plaintiffs lack standing because of a failure to allege an injury fairly traceable to defendants' conduct. Defendants continue to content that plaintiffs lack standing because they have failed to allege an injury that is concrete and imminent. Defendants regret any confusion caused by their previous position in this lawsuit.

Respectfully Submitted,

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I hereby certify that on January 5, 1995 a copy of the forgoing Defendants' Supplemental Statement With Respect to Jurisdiction was sent by Federal Express to:

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